Supreme Court, U.S.
FILED
AUG 9 1991
OFFICE OF THE CLERK

(3)

No. 90-1715

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PHT, INC., d/b/a POLYNESIAN HOSPITALITY TOURS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

RECEIVED
HAND DELIVERED
AUG - 9 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ROBERT T. THOMPSON
WILLIAM B. COWEN *
JOHN A. PENELLO
THOMPSON, MANN & HUTSON
3000 K Street, N.W.
Suite 600
Washington, D.C. 20007
(202) 625-4000

RONALD Y. K. LEONG
MARCUS B. SIERRA
WATANABE, ING & KAWASHIMA
Hawaii Tower
5th & 6th Floors
745 Fort Street
Honolulu, HI 96813-3889
(808) 544-8300

Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12

TABLE OF CONTENTS

	Page
I. THE EMPLOYEES' EFFORTS TO CAUSE SYLVA'S TERMINATION ARE UNDISPUTED IN THE RECORD	2
II. ALL ISSUES RAISED IN THE PETITION FOR A WRIT OF CERTIORARI WERE PRESENTED TO THE BOARD BELOW	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

Damon House, Inc., 270 NLRB 143 (1984) 5
Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) 5, 7
Local 900, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB, 727 F.2d 1184 (D.C. Cir. 1984) 7
May Department Stores v. NLRB, 326 U.S. 376 (1945) 8
NLRB v. Cheney California Lumber Co., 327 U.S. 385 (1946) 8
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 2, 3
Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 (1982) 5, 7
Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. den.*, 455 U.S. 989 (1982) 5, 6

STATUTES

29 U.S.C. § 160(e) 2, 5, 7, 8
29 U.S.C. § 158(b) (1) (B) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1715

PHT, INC., d/b/a POLYNESIAN HOSPITALITY TOURS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

As reflected in the Petition for a Writ of Certiorari, this case presents three related issues arising under the National Labor Relations Act concerning the rights of employees who strike to force their employer to discharge a senior female management official. These issues are: (1) whether the Act protects an employee strike to force the discharge of any supervisory or managerial official; (2) whether an employer may discipline employees who strike to force the discharge of a female management official because of her sex; and (3) whether an employer may discipline employees who engage in a strike to force the discharge of a senior female management official, where there are other, protected motives for the strike.

In opposing certiorari, Respondent fails to address the merits of these issues. Resorting to legalistic sleight of hand, Respondent now argues that the striking employees never sought the termination of Operations Manager

Gloria Sylva and therefore none of these issues are properly before the Court.[1] Respondent also argues that Court review is partially precluded by Section 10(e) of the Act, 29 U.S.C. § 160(e), because Petitioner allegedly did not raise before the Board its contention that the protected aspects of the strike did not privilege the employees' otherwise unprotected motives. Respondent's arguments do not withstand scrutiny.

I. THE EMPLOYEES' EFFORTS TO CAUSE SYLVA'S TERMINATION ARE UNDISPUTED IN THE RECORD.

In the decisions below, neither the Board nor the Administrative Law Judge disputed the fact that the striking employees sought the termination of Operations Manager Gloria Sylva. Rather, this fact essentially was conceded by all, with the debate centering on the reasons or justification for such conduct. Relying upon an interpretation of the Act that has been unanimously rejected by every court of appeals to have considered the issue, the Board and Administrative Law Judge found as a matter of law that such an objective constituted protected activity. Pet. App. 8a n.2, 90a. If, as Respondent now argues, the Board was of the view that the employees were not so motivated, it need only have so stated.[2] Such a factual

---

[1] Respondent's argument that the striking employees did not seek the termination of Operations Manager Gloria Sylva is belied in its own brief. Twice Respondent cites findings adopted by the Board demonstrating that the employees sought Sylva's termination. Resp. Br. 6 n.3, 12; Pet. App. 89a-90a. Rather than dispute the employees' objectives, the referenced findings attempt to justify the employees' efforts as protected activity. Pet. App. 8a n.2, 90a. It is this legal conclusion that is the subject of the Petition for a Writ of Certiorari.

[2] Even assuming that such a finding were made, it clearly would not be supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The evidence showing that the employees were motivated, at least in part, by a desire to rid themselves of Sylva is overwhelming. The Administrative Law Judge found that the picketers chanted "Hidey, hidey, ho, the bitch has

finding, if it existed, normally would be entitled to great deference, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). *However, there is no such factual finding in the record.*[3]

In the absence of a specific finding, the Board's conclusions must be inferred from the circumstances of the proceedings below and the contemporaneous actions of the Board. The Board adopted the decision of the Administrative Law Judge which credited all of the evidence demonstrating that the employees sought Sylva's termination. Moreover, the Board did not dispute Petitioner's argument that the employees were so motivated, and the Board specifically stated that such a motivation was protected under its interpretation of the Act. Pet. App. 8a

---

got to go" (Pet. App. 64a, 65a), the Charging Party's business manager said "we are going to call this the Gloria strike" (Pet. App. 65a), and one of the leading strikers said that the employees were declining to come to work because of [Sylva], that they wanted her "out" (Pet. App. 73a).

The ALJ also found that the employees did, in fact, call for the replacement of Sylva in a rude, even discourteous or obscene fashion (Pet. App. 64a). Furthermore, the record contains an audiotape of the picketers chanting: "All you gotta do is fire her. All you got to do is fire her, that's easy to do. All you got to do is say one name, that's all. All you have to do is fire her, that's very easy to do. All you say is fired." J.A. 432, Petition for Review of a Decision and Order of the National Labor Relations Board, D.C. Cir. (October 25, 1990). Finally, the transcript of the hearing demonstrates that even after Sylva was transferred to a different department, the picketers were not satisfied, they wanted her "out, out." J.A. 250 (October 25, 1990).

[3] Without record citation, Respondent closes its brief with the statement "[a]ccordingly, the Board properly found that the employees' comments made on the picket line did not establish that the purpose for the stoppage was to remove Sylva from management." *However, the Board made no such finding.* As explained *infra*, due to the Board's myopic view of employee efforts to affect changes in supervision, any findings on this critical issue must be inferred from the record. The record does not support the inference proposed by Respondent.

n.2. The inescapable conclusion is that the Board was satisfied that the employees sought Sylva's termination, but considered such conduct to be protected.

This interpretation of the law was the primary issue raised before the court of appeals below. It was briefed and argued vigorously by both parties. Indeed, in its brief to the court of appeals, Respondent conceded that the employees sought Sylva's termination.[4] Thus, Respondent's argument in opposition to certiorari is a radical departure from its position taken below. Under these circumstances, questions concerning the legal impact of the various motives/objectives of the strike are squarely presented by the record in this case.

Respondent's revisionist view of the record below highlights one of the problems presented by the bifur-

---

[4] Respondent's position below is reflected in the following excerpts from its brief to the court of appeals:

> [T]he Company focuses on the employees' desire to effect the transfer or discharge of Sylva, and argues that the work stoppage was therefore unprotected. The Company, however, mischaracterizes the decision of the Board, *which found that the employees' concerns over Sylva were but one of their reasons for protesting.* In any event, the employees' concerns with Sylva, who had committed the earlier unfair labor practices and who scheduled employee assignments, were directly related to their working conditions, and *their attempts to remove her are covered by Section 7 of the Act's protection* of "concerted activities for the purpose of . . . mutual aid or protection . . . ."

NLRB Br. 18, On Petition for Review and Cross-Application for Enforcement, D.C. Cir. (September 27, 1990) (emphasis added).

* * * *

> Moreover, *even acknowledging that the transfer or discharge of Operations Manager Sylva was among the employees' objects in stopping work, as the Board found [Pet. App. 8a n.2], that object would not render the employees' conduct unprotected here. . . .* In any event, Sylva's conduct was but one of the causes of the work stoppage, and the Board reasonably found that the other causes of the work stoppage also satisfied the statutory test of concerted activity for mutual aid or protection.

NLRB Br. 31 (September 27, 1990) (emphasis added).

cated regulatory environment maintained by the Board in this area of the law. In blindly adhering to its view that the Act protects all employee efforts to cause the discharge of management officials who "affect working conditions," the Board fails to analyze the issues in the context of the law as interpreted by the various courts of appeals. The result inevitably is that key findings must be inferred from the record. Any such "deficiencies," however, are attributable directly to the Board and its handling of such cases. Respondent should not be permitted to rely upon its own shortcomings to escape Court review.

II. ALL ISSUES RAISED IN THE PETITION FOR A WRIT OF CERTIORARI WERE PRESENTED TO THE BOARD BELOW.

Relying upon this Court's decisions in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982), and *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), Respondent asserts a jurisdictional objection to review of the issue of whether an employer may discipline employees who engage in a strike to force the discharge of a senior female management official, where there are other, protected motives for the strike. Respondent maintains that this dual motive issue was not raised before the Board, and therefore judicial review is precluded by Section 10(e) of the Act, 29 U.S.C. § 160(e).

The record clearly demonstrates that the dual motive issue was presented to the Board below. This is perhaps most vividly shown by the following excerpt from Petitioner's Brief in Support of Amended Exceptions to Decision of the ALJ (Dec. 28, 1988):

> [Petitioner] suggests that a careful analysis of *Damon House* [270 NLRB 143 (1984)] reveals that the Board actually utilized a Wright-Line type test [*Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981), *cert. den.*, 455 U.S. 989 (1982)] to determine (in cases involving a mixed motive fact pattern)

whether the discharge of employees engaged in concerted activities designed to cause the removal of a high level Section 2(11) supervisor is unlawful. Assuming this to be true, [Petitioner] contends that it has affirmatively established that its discharge of employees that engaged in the November 10, 1986 "stop work meeting" was based upon three entirely lawful reasons:

1) the employees' complaints against Gloria Sylva centered on their sexist attitude about working for a woman, and in essence, unlawfully demanded [Petitioner] to discriminate against her in violation of Title VII of the Civil Rights Act of 1964;

2) the [Petitioner] had a right to resist its employees' efforts to cause the removal of a high level manager who performed grievance adjustment functions within the meaning of Section 8(b)(1)(B) of the Act; and

3) as a matter of business judgment, [Petitioner] could not allow the employees' unprotected workstop to shut down its operations.

Thus, even assuming, *arguendo*, that the General Counsel could show that there were some matters with respect to Gloria Sylva's identity as a supervisor that employees could demonstrate directly impacted their job interests, thereby rendering those matters protected, (a claim which [Petitioner] argues is without foundation in the record) under the Board's Wright-Line analysis, [Petitioner] has nevertheless established that the *"overall thrust"* of the employees' actions on November 10, 1986 were unprotected. Accordingly, [Petitioner] could lawfully discharge the employees for engaging in said unprotected activities.

Pet. Br. in Support of Am. Exc. to Dec. of ALJ, at 39-40 (Dec. 28, 1988). Thus, Respondent's assertion that the dual motive issue was not raised before the Board is utterly without support.

Moreover, Respondent's reliance on *Woelke & Romero* and *Detroit Edison* is misplaced. In *Woelke & Romero*, the Board had decided an issue not specifically presented to it by the parties. The Court held that because the employer had not challenged the Board's disposition of this issue through a motion for reconsideration or rehearing, Section 10(e) precluded judicial review. 456 U.S. at 666. In *Detroit Edison*, the employer, before the Board, failed to challenge a specific finding made by the ALJ. The Board adopted this finding, but ordered a different remedy. Before the Supreme Court, the employer attempted to raise an objection to this previously unchallenged finding. The Court found that Section 10(e) precluded review of this finding. 440 U.S. at 311.

The instant case presents the converse situation. Here, the Petitioner specifically challenged the key findings of the ALJ and presented the dual motive issue to the Board for decision.[5] However, the Board, ignoring consistent court of appeals decisions to the contrary, continued to adhere to its position that a strike to cause the termination of a supervisor who "affects working conditions" is protected under the Act. Thus, the Board considered all motives for the strike to be protected, and did not consider or express its view on the dual motive issue. Absent a finding or discussion by the Board, Petitioner had no opportunity to challenge the Board's unarticulated position on possible dual motives.[6] Indeed, it was the court of appeals which first pursued the dual motive rationale when it enforced the Board's order without regard to the

---

[5] Even assuming that the issue had not been expressly presented to the Board in Petitioner's brief, the question of dual motives necessarily was implicated by Petitioner's argument that the employees' efforts to oust Sylva were unprotected. Thus, the Board had sufficient notice of the dual motive issue. *See, e.g., Local 900, International Union of Electrial, Radio and Machine Workers, AFL-CIO v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984).

[6] Even assuming that Section 10(e) otherwise was applicable, this alone would satisfy the "extraordinary circumstances" exception alluded to by Respondent.

unprotected status of the employees' efforts to cause Sylva's termination.

The purpose of Section 10(e) is to put the Board on notice and to insure that "all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board." *NLRB v. Cheney California Lumber Co.*, 327 U.S. 385, 389 (1946). The arguments addressed in the briefs before the Board certainly were adequate to put the Board on notice of Petitioner's position that the striking employees were subject to discipline even if the work stoppage had both protected and unprotected motives.[7] Contrary to Respondent's contention, Petitioner has steadfastly maintained its position at every stage of the proceedings, with increasing detail and analysis as the litigation progressed. Section 10(e) of the Act does not preclude Court review of this issue.

---

[7] *See May Department Stores v. NLRB*, 326 U.S. 376, 386 n.5 (1945) (the specificity required for a claim to escape the bar imposed by Section 10(e) is that which shall "apprise the Board of an intention to bring up the question").

CONCLUSION

For the reasons stated above and in its original petition, PHT, Inc. respectfully submits that the judgment of the court of appeals should be reversed.

Respectfully submitted,

ROBERT T. THOMPSON
WILLIAM B. COWEN *
JOHN A. PENELLO
THOMPSON, MANN & HUTSON
3000 K Street, N.W.
Suite 600
Washington, D.C. 20007
(202) 625-4000

RONALD Y. K. LEONG
MARCUS B. SIERRA
WATANABE, ING & KAWASHIMA
Hawaii Tower
5th & 6th Floors
745 Fort Street
Honolulu, HI 96813-3889
(808) 544-8300

Counsel for Petitioner

* Counsel of Record